

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)
)
Interconnection between Local Exchange Carriers)
and Commercial Mobile Radio Service Providers)

CC Docket No. 96-98

REPLY COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby submit their Reply Comments in response to the Commission's Further Notice of Proposed Rulemaking in the above referenced proceeding.¹

As BellSouth identified in its Comments, the *Notice* in a brief two paragraphs sets forth a concept, that if adopted, would eviscerate the Commission's core determinations in its local competition orders regarding UNEs.² This single theme predominates the comments in this proceeding. With the exception of a few IXC's, commenters generally oppose permitting UNEs to be substituted for exchange access. While not suprisingly the IXC's assert that they should be permitted to use UNEs in lieu of exchange access, they simply are unable to provide a cogent explanation of how such a step would be consistent with the statute or prior Commission

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Provider*; CC Docket No. 96-98, Further Notice of Proposed Rulemaking, FCC 97-295, released August 18, 1997.

² BellSouth at 5.

determinations. Instead, the Commission is supposed to accept their assertions as sufficient justification to trash its existing policy and ignore the statute and its requirements.

There is nothing in the Communications Act that compels the Commission to adopt a rule that reverses existing Commission decisions. To the contrary, sound administrative policy would eschew embarking on a course that deviates from existing policy. The Commission's existing policy and rules which require the purchaser of UNEs to provide local service, is consistent with statutory requirements. Nothing has occurred within the short period since this policy was adopted that could explain or justify a new direction by the Commission.

MCI incorrectly characterizes the issue here as grafting a limitation on to the statute.³ The plain language of Section 251(c)(3) is not the open invitation to substitute UNEs for exchange access that MCI and others believe. Section 251(c)(3) enables a requesting carrier to obtain UNEs for the provision of telecommunications service.⁴ The fact that IXC's are carriers and provide interexchange services does not end the inquiry, as apparently MCI and AT&T assume.⁵ Acquisition of UNEs for the purpose of replacing exchange access does not fall within the statutory requirement. Requesting carriers may only obtain UNEs for the provision of a telecommunications service. The Act defines a telecommunications service as the "offering of telecommunications for a fee directly to the public..."⁶ An IXC using UNEs to replace exchange access are not offering a telecommunications service to the public. They are merely substituting UNEs for a service that they purchase. Moreover, as users of interstate exchange access, IXC's

³ MCI at 2.

⁴ 47 U.S.C. § 251(c)(3).

⁵ MCI at 3; AT&T at 2.

⁶ 47 U.S.C. § 153(46).

have long been considered by the Commission as no different than any other customer. IXC's have no special status as a carrier in obtaining exchange access.⁷ Thus, there is nothing in Section 251 that requires an incumbent LEC to provide a customer access to unbundled elements in order for that customer to use such elements as a substitute for a telecommunications service that it obtains from a carrier.

Moreover, under the impairment standard of Section 251(d)(2)(B), it is clear that failure to provide IXC's access to UNEs would not impair an IXC's ability to provide a service it seeks to offer. At issue here are UNEs that would be used by IXC's not to provide a service but rather to replace a service that they obtain as customers. Thus, there is no basis under Section 251 (d) to direct incumbent local exchange carriers to provide IXC's access to UNEs unless that IXC is also providing local service.

Further, as Ameritech establishes, to construe Section 251(c)(3) so as to permit IXC's to substitute UNEs for the exchange access service would be inconsistent with the requirement of Section 251(g) that access charges continue until the Commission issues superseding regulations.⁸ Less than 6 months ago, in CC Docket No. 96- 262, the Commission did not supersede its access charge rules. To the contrary, in reforming the access charge rules, the Commission confirmed its intention to continue its access charge regime.

⁷ *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, FCC 84-51, Appendix D at p. 2-85, released February 17, 1984. *See also*, *MTS/WATS Market Structure*, CC Docket No. 78-72, Phase I; Order on Reconsideration, FCC 83-356, released August 22, 1983.

⁸ Ameritech at 3-10. As both Ameritech and NECA show, the legislative history makes clear that Section 251 was not designed to allow telecommunications carriers to circumvent the current tariff-based system of interstate access charges. *See*, Ameritech at 11-12; NECA at 5.

The comments clearly show that if the Commission were to permit IXC's to substitute UNEs for exchange access, the Commission would be acting in a manner wholly inconsistent with its prior decisions. For example, ALTS points out that the technical feasibility of combining UNEs with Part 69 rate elements to originate and terminate toll traffic existed when the Commission issued its *Local Competition Order*. The Commission did not permit such use of UNEs then, and it cannot justify such use of UNEs now on the basis that it is technically possible to use transport UNEs for exchange access.⁹

Even more significant is the fact that the Commission has determined, and its rules reflect the fact, that a purchaser of UNEs obtains the exclusive use of the UNE. With regard to shared transport, the Commission has defined the shared transport UNE to include the routing guides associated with unbundled switching. Thus, a carrier cannot obtain shared transport without also obtaining unbundled switching. Unbundled switching includes all of the features and functions of the switch, including those necessary to provide local service. If IXC's were permitted to substitute the transport UNEs for exchange access without also providing local service, such a result would be at fundamental odds with the Commission's determination that purchasers of UNEs obtain the exclusive use of such UNEs. As Time Warner points out, it is simply impossible for two carriers [local and interexchange] to have exclusive control of unbundled switching.¹⁰

Exchange access services and UNEs are fundamentally different. The Commission recognized this difference in its *Local Competition Order* stating, "[w]hen an IXC purchases unbundled elements from incumbents, they are not purchasing exchange access 'services.'"¹¹ The

⁹ ALTS at 6-8.

¹⁰ Time Warner at 10.

¹¹ *Local Competition Order* at ¶ 358.

distinction between access services and UNEs was likewise recognized by the Eighth Circuit in

Competitive Telecommunications Inc. v. FCC.¹²

The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service. Obviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct.¹³

To permit IXCs to substitute UNEs for exchange access would be contrary to both Commission and judicial precedent.

Some commenters suggest that permitting IXCs to substitute UNEs for exchange access would further the Commission's *Access Charge Reform* objectives because it would reduce prices for transport.¹⁴ This argument is little more than a thinly-veiled attempt to arbitrage between lower-priced UNEs and exchange access. Such arbitrage, however, is incompatible with the market-based access charge regime adopted by the Commission in its *Access Charge Reform Order*. As Time-Warner observes, the market-based access charge system anticipates entry into local markets by competitors who in turn offer competitive access prices.¹⁵ Permitting IXCs to substitute UNEs for exchange access simply allows IXCs to bypass the access charge system without increasing competition in the local exchange market.¹⁶

Not only would arbitrage between UNEs and exchange access not increase local competition but also such arbitrage could undermine existing competition. Competitive access providers (CAPs), who have been encouraged by the Commission to compete on a facilities basis

¹² 1997 U.S. App. LEXIS 15398 (8th Cir. 1997).

¹³ *Id.* at 9-10.

¹⁴ MCI at 4-6; AT&T at 6.

¹⁵ Time-Warner at 12.

¹⁶ *Id.*

with incumbent local exchange carriers for transport services, would find that IXC's not only could circumvent an incumbent's access services but also those of the CAPs.¹⁷ For six years, CAPs have invested in building alternative transport networks and competing with incumbents for the provision of exchange access transport. Indeed, in BellSouth's operating areas, there are one hundred operational CAP networks, forty-six of which have switching capabilities. Another twenty-seven networks are currently under development. This substantial investment in competitive networks would not have taken place if it were known that the Commission, by changing the rules, would eliminate the competitive market opportunity.

Apart from the detrimental competitive effects, there are other unpropitious consequences that would flow from permitting IXC's to arbitrage UNEs and exchange access. Several commenters point out that allowing IXC's to substitute UNEs for exchange access would effectively shift the jurisdiction over interstate access from the Commission to the states.¹⁸ Such a shift would not only be an impermissible transfer of the Commission's jurisdictional responsibilities¹⁹ but, in addition, would be contrary to the Commission's determination in the *Local Competition Order* that it was not placing exchange access under the administration of the states.²⁰ In the *Local Competition Order*, the Commission made clear it was retaining its exchange access rules and its regulatory authority over interstate prices. Thus, in the *Local Competition Order* the Commission recognized and maintained the difference between exchange access and UNEs. The distinction between the two is not merely a matter of semantics, but rather

¹⁷ See BellSouth at 11.

¹⁸ See e.g. USTA at 8; SWB at 8.

¹⁹ See SBC at 7-8; USTA at 7.

²⁰ *Local Competition Order* at ¶ 358.

is central to the competition framework the Commission has established. No reason has been provided in this proceeding for the Commission to dismantle its framework.

AT&T attempts to entice the Commission to disregard its own precedent by suggesting that the financial consequences of arbitrage would be insignificant.²¹ As BellSouth stated in its comments, if the Commission were to permit IXC's to substitute UNEs for exchange access, such a change in Commission policy could result in a net revenue loss for BellSouth alone of nearly \$300 million. Such revenue losses are not inconsequential nor should they be lightly considered by the Commission as suggested by AT&T.

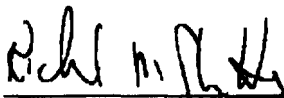
In terms of the statute's requirements, Commission and judicial precedent and the public interest, it is inescapable that the Commission should not permit UNEs to be substituted for exchange access. The Commission, in its *Local Competition Order*, established the nexus

²¹ AT&T at 7. In addition to attempting to dismiss the financial consequences that follow the decoupling of the purchase of UNEs and the provision of local service, another AT&T diversion is its contention that it does not have the technical ability to sort terminating toll traffic by local service provider. AT&T at 8. Shared transport does not require the IXC to sort traffic by local provider. Where multiple local providers provide exchange access over shared transport facilities, the IXC's will still be able to terminate all of their traffic in the same way they currently do. The only difference is that there will be multiple exchange access providers corresponding to the carriers providing local service. Each of these local service providers will render the IXC's access bills for calls that terminate to the local service provider's customer.

between the purchase of UNEs and the provision of local service. There simply is no basis for the Commission to tear down the competitive framework it created.

Respectfully submitted,

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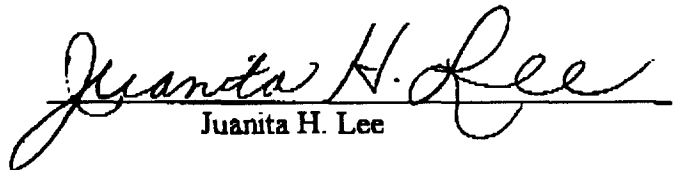
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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of October, 1997 served all parties to this action with a copy of the foregoing **REPLY COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



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